IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,

Plaintiff,

No. 2:00-CV-2041

vs.

PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual, AND JOHN HERKLOTZ, an individual,

Defendants.

RESPONSE OF WRS, INC. TO DEFENDANT JOHN HERKLOTZ'S MOTION TO OPEN JUDGMENT PURSUANT TO RULE 60(b)

AND NOW comes, WRS, Inc., by and through its counsel, Thomas E. Reilly, P.C., and files the following Response to the Motion filed by the Defendant, John Herklotz, seeking to open the Judgment entered on February 20, 2007 pursuant to Rule 60(b):

I. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

1. Defendant Herklotz does not specify which Section of Rule 60(b) he is relying upon for reconsideration or reopening of the Judgment entered on February 20, 2007.

2. The bulk of the allegations contained in the Motion claim that evidence produced by Charles von Bernuth, Eric Parkinson, and Plaza Entertainment, Inc., in their Motion seeking to open the Default Judgments constituted "newly discovered evidence"

that would have an impact on the amount of the Judgment entered against Herklotz or that misconduct of John Gibson impaired Herklotz's ability to defend.

3. F.R.C.P. 60(b)(2) provides for the relief from the Judgment based upon "newly discovered evidence".

4. F.R.C.P. 60(b)(3) provides for relief based upon misconduct of an opposing party.

5. As explained below, WRS disputes that Herklotz can establish the elements required to sustain a Motion based on either section. Specifically, Herklotz never pursued his own discovery as to Plaza, Parkinson or von Bernuth and, therefore, Herklotz did not act with reasonable diligence to acquire the Plaza evidence prior to the judgment and is, therefore, not "excusably ignorant" of the alleged "newly discovered evidence". Furthermore, because Herklotz never asked Gibson or his clients for the alleged evidence, Herklotz cannot complain that he did not know about it because Gibson did not participate in Plaza's defense.

6. Although Herklotz contends that F.R.C.P. 60(b)(6) supports his claim for relief, 60(b)(6) is unavailable when the subject purportedly justifying relief is one addressed in F.R.C.P. 60(b) (1 through 5).

8. Pursuant to F.R.C.P. 60(C)(1), a Motion properly based upon F.R.C.P. 60(b)(2) and (3) may not be entertained more than one year after the entry of the Judgment.

9 F.R.C.P. 60(b)(6) cannot be used to circumvent the limitations imposed on 60(b)(2) and (3) by F.R.C.P. 60(C)(1).

10. As alleged in Paragraph 1, the Judgment that Defendant Herklotz seeks to open was entered on February 20, 2007 while he filed his Motion over one year later on May 5, 2008.

11. Even if Herklotz's Motion was properly based upon F.R.C.P. 60(b)(6), Herklotz was required to file the Motion within a reasonable time which is construed to be one year absent "extraordinary circumstances."

12. Herklotz's claim to have learned of the "newly discovered evidence" and Gibson's misconduct when von Bernuth filed his Motion on October 16, 2007 is not accurate. Rather, the court placed information concerning the alleged "newly discovered evidence" and Gibson's misconduct on the docket in June of 2007 when the court caused to be filed Parkinson's letter mentioning those issues. (Doc. 148)

13. Herklotz had a sufficient opportunity to move for 60(b) relief within one year but did not seek reconsideration action until May 6, 2008 despite having filed various responses to Motions of WRS, Stipulations regarding supplemental relief, status reports, and a request for *nunc pro tunc* certification regarding the Order of February 8, 2008. (Doc, 168, 170, 178, 190,191,192 and 195).

14. Herklotz also suggests that the prospect of "inconsistent judgments" in which Plaza will be found liable for an amount different than the amount of the judgment against Herklotz warrants the opening of the judgment.

15. As explained below Herklotz's assertions are substantively incorrect. However, the Court need not address the substance of this assertion because it likewise has not been raised in a timely fashion.

16. Although the Court opened the Plaza Judgment in March 2008, beyond the one-year anniversary of the Herklotz judgment, the prospect about which Herklotz complains, inconsistent judgments, arose as early as the date the action was commenced and certainly when Plaza filed its Motion for 60(b) relief on January 30, 2008. Thus, Herklotz had at least 20 days within the one-year time frame to raise the issue he now asserts. Twenty days is certainly an adequate amount of time to consider and assert this theory since the rules contemplate 20 days as a sufficient amount of time for defendant to formulate its entire response to a Complaint. (F.R.C.P. 12).

17. Herklotz has not alleged any extraordinary circumstances to excuse his failure to move for relief within the one-year reasonable time requirement applicable to 60(b)(6). Furthermore, Herklotz failed to explain his delay of over six weeks from the entry of the Order opening the Plaza Judgment despite the characterization of the current Motion as an "emergency."

18. WRS submits that in light of the proceedings, to the extent that Herklotz's Motion can be properly characterized as one founded on F.R.C.P. 60(b)(6) rather than F.R.C.P. 60(b)(1 through5), which is denied by WRS, Herklotz's Motion was nevertheless not filed within a reasonable time.

18. Because Herklotz filed his Motion late, the Court may not entertain the Motion.

19. Accordingly, Herklotz's Motion fails to state a claim for relief that can be granted.

WHEREFORE, Plaintiff respectfully requests that the Court deny the Motion of Defendant Herklotz seeking reconsideration of the Judgment of February 20, 2007.

II. RESPONSE

1. Admitted in part. Denied in part. WRS admits the averments contained in Paragraph 1 except to the extent of the amount of the Judgment. Rather, on February 20, 2007, at Docket No. 139, Judge Schwab entered a Judgment in favor of WRS and against Defendant Herklotz in the sum of $2,584,749.03.

2. Admitted in part. Denied in part. WRS admits that Herklotz's claims were severed when Herklotz asked to transfer the case to California. (Doc. 108). Herklotz's counsel made a strategic decision not to withdraw the Motion for Transfer following the entry of the judgment against Herklotz and the Default Judgments against Plaza, Parkinson and von Bernuth.

3. Admitted. By way of further answer, although von Bernuth's Motion of October 16, 2007 contained the information that Herklotz now characterizes as newly discovered evidence and disclosed Gibson's misconduct, this information was placed on the record on June 5, 2007 when the Court filed Parkinson's letter complaining about Gibson and mentioning evidence in his possession. (Doc. 148)

4. Admitted in part. Denied in part. WRS admits the first sentence of Paragraph 4. WRS specifically denies that the documents on record with the Court contain evidence that would constitute "newly discovered evidence" that would justify a Motion based upon F.R.C.P. 60(b)(2). Rather, the evidence dose not qualify as newly discovered under 60(b)(2) because the alleged evidence was of the kind that could have been discovered had Herklotz exercised reasonable diligence by pursuing discovery against von Bernuth, Parkinson and Plaza during the 5 1/2 years that preceded the entry of the Judgment. Herklotz's counsel chose not to pursue discovery against von Bernuth,

Parkinson and Plaza because such discovery was inconsistent with Herklotz's defensive strategy revealed in his Motion for Summary Judgment or, alternatively, Partial Summary Judgment. (Doc. 81). This strategy was to argue that WRS' records were inherently unreliable and consequently insufficiently probative rather than to obtain evidence from Plaza to establish an accurate amount of the debt. F.R.C.P 60(b) is not intended to relieve litigants from the consequences of their counsel's strategic choices.

5. Denied. As pointed out above, Herklotz points to "newly discovered evidence" (F.R.C.P. 60(b)(2)) and opposing party misconduct (F.R.C.P. 60(b)(3)) as justifying his requested relief. Both of his contentions are untimely under F.R.CP.P. 60(c)(1). Fundamental fairness and judicial consistency are not implicated because Herklotz's request is out of time and now beyond the Court's jurisdiction to entertain. No emergency exists except that which has been created by Herklotz's own strategy and his counsel's apparent second-guessing.

6. Admitted. By way of further answer, Gibson participated in the litigation even after discovery closed on January 31, 2006.

7. Admitted in part. Denied in part. WRS, Inc., admits that von Bernuth requested that the Default Judgment be opened because of John Gibson's failure to participate in the litigation after the conference of March 9, 2006. Gibson did participate in the litigation prior to March 2006 and throughout the discovery phase that closed on January 31, 2006.

8. Denied. WRS, Inc., denies the allegation set forth in Paragraph 8 as stated. Rather, the reasons supporting von Bernuth's Motion were contained in his Motion.

9. Admitted in part. Denied in part. WRS admits that the information that Herklotz characterizes as newly discovered evidence and disclosure of John Gibson's misconduct were contained in von Bernuth's Motion. This information was available to Herklotz as early as June 5, 2007 when the court filed Parkinson's letter complaining about Gibson and mentioning evidence in his possession. WRS denies that Charles von Bernuth asserted facts that would constitute a defense as to WRS' claims since von Bernuth addressed matters that were not raised by Herklotz as a defense.

10. Denied as stated. WRS is unable to understand which Order Herklotz is referring to as the "aforementioned Order." Said statement is therefore denied. The Opinion of Judge Standish dated March 13, 2008 speaks for itself. Because von Bernuth asserted defenses that were not asserted by Herklotz, the implication that von Bernuth's potentially meritorious defenses would potentially be meritorious defenses for Herklotz is denied. Herklotz agreed in his guaranty the that his liability was unconditional and direct, his liability was joint and several, and adjudication of his liability was not dependant upon any adjudication as to Plaza's liability. Having had a full and fair opportunity to make out his defense, subsequent adjudications as to Plaza's debt are not relevant to Herklotz's adjudicated liability.

11. Denied. The Judgment against Herklotz was not based upon the amount of the Judgment entered by default against von Bernuth, Parkinson, or Plaza. On the contrary, the Default Judgment amount was the amount established by the Court's determination of WRS' Motion for Summary Judgment as to Damages which was fully and completely litigated by Herklotz as follows: WRS filed its Concise Statement in support of its Motion for Summary Judgment as to damages (Document 116). Herklotz

responded to the WRS's Concise Statement (Document 127) and WRS responded to the Herklotz Response (Document 130). On January 31, 2001, the Court conducted a hearing on whether the Concise Statements of WRS and Herklotz raised a genuine issue of material fact as to the amount of damages claimed by WRS. Following the hearing, the Court concluded that there was no genuine issue of material fact as to the amount of the damages established by WRS, notwithstanding Herklotz's dispute and entered Judgment in favor of WRS and against Herklotz in the amount of $2,584,749.03. Having entered Judgment in that amount against Herklotz, the Court utilized the damage calculation as to Herklotz in entering the Default Judgments as to von Bernuth, Parkinson and Plaza.

12. Denied. The averments contained in Paragraph 12 are denied since the evidence proffered by von Bernuth through the Parkinson Affidavit would not change the amount of the damages recoverable by WRS as evidenced by the Response to the Parkinson Affidavit (Doc.159). Furthermore, the information relied upon by Herklotz is not "newly discovered evidence" under F.R.C.P. 60(b)(2) because the evidence could have been obtained by Herklotz through reasonable diligence during the 5 ½ years the case was pending by pursuing discovery from von Bernuth, Parkinson and Plaza. Herklotz's counsel, however, did not pursue any such discovery.

13. Admitted in part. Denied in part. WRS admits that the allegations contained in Paragraph 13 are accurate insofar as they describe the defensive strategy pursued by Herklotz and his counsel, which contended that WRS' records were inherently unreliable and consequently insufficiently probative rather than obtaining evidence from Plaza to establish the accuracy of the WRS calculations. WRS denies the

validity of the argument. At the hearing conducted by the Court on WRS' Motion for Summary Judgment for damages, Herklotz was called upon to produce evidence to contradict the calculation of damages contained in WRS' Concise Statement but did not produce any contradictory evidence, but reiterated that the WRS' records were not probative. Of course, Herklotz had no contradictory evidence because Herklotz never sought to obtain evidence from Plaza during the 5 ½ years of this litigation. Herklotz had a full, fair, and complete opportunity of over 5 1/2 years to pursue discovery as to all parties in litigation in an effort to refute or contradict the calculation of damages by WRS. Herklotz made the strategic choice not to undertake discovery as to any other party other than WRS, although if undertaken with reasonable diligence might have brought to light the information that Herklotz now seeks to claim is "newly discovered evidence". In fact, the arguments mentioned by Herklotz in Paragraph 13 formed the basis for the Motion for Summary Judgment or, in the alternative, Partial Summary Judgment filed by Herklotz on February 24, 2006 (Docket No. 81). Presumably, by filing this Motion, Herklotz's counsel made the strategic decision that they had sufficient information regarding the calculation of damages to reach the conclusion in support of their argument.

14. Denied. The averment contained in Paragraph 14 is specifically denied. Rather, Herklotz's liability was direct and unconditional and he agreed that WRS did not have to proceed against the principal, other guarantors, or the collateral securing the debt. Accordingly, Herklotz's Guaranty contemplated that he could be found liable for the total debt while no Judgment was entered against Plaza and that WRS could file separate actions at different times and depending on the amount proved in the action, for differing

amounts against Herklotz and Plaza. An adjudication of Herklotz's liability was not dependant upon a determination of Plaza's liability. The cases cited are inapposite because they deal with performance bonds covering contractor performance such that the bonding companies liability was dependant upon a determination of material a breach by the principal and not unconditional and direct guaranties of indebtedness, which created joint and independent several liability. Furthermore, this argument was available to Herklotz when he moved for summary judgment, in defense of WRS' Motions for Summary Judgment since the Default Judgments had not been entered at that time. Herklotz's counsel did not assert it at that time, nor did Counsel assert it in response to WRS' request for certification of finality pursuant to F.R.C.P. 54(b), from which certification sought and obtained the benefit when Herklotz asked for clarification that the certification be retroactive to February 20, 2007. Clearly, this argument second guesses Herklotz's counsel's previous strategic decisions. A Motion based on F.R.C.P. 60(b) is not a vehicle for introducing new or different legal theories.

15. Denied. The averment contained in Paragraph 15 is specifically denied. As a result of the inactivity of John Gibson, neither von Bernuth, Plaza, or Parkinson, participated in the defense of the claims asserted by WRS after March of 2006. Gibson, however, participated on their behalf during discovery, which closed on January 31, 2006. Herklotz fully participated in the defense of the claims, engaged in discovery, and had a full and fair opportunity to undertake discovery from all parties. Herklotz's counsel made the strategic decision that it was not necessary to take discovery as to von Bernuth, Plaza, or Parkinson, during the 5 ½ years that preceded the filing of Herklotz's Motion for Summary Judgment or, in the alternative, Partial Summary Judgment (doc.

81). Having had a full, fair, and complete opportunity to litigate the issue of liability and to contradict the evidence produced by WRS in support of its claim for damages and having failed to produce any contradictory evidence, Herklotz has no basis upon which to open the Judgment. The potential that an eventual judgment against the other Defendants could differ in amount from that against Herklotz was a possibility created by the Guaranty Agreement Herklotz signed. This argument was available when Herklotz filed his first Answer, throughout the case, and most clearly when Herklotz moved for Summary Judgment (Doc. 81) but it was not raised. It was available Court entertained WRS' Motion for Summary Judgment, but Herklotz's counsel did not raise it. F.R.C.P. 60(b) is not a vehicle for introducing new or different legal theories.

16. Denied. The averment contained in Paragraph 16 is specifically denied to the extent that it intends to allege that the evidence and figures constitute newly discovered evidence as a premise upon which the Court could consider opening the Judgment and providing relief from the Judgment pursuant to F.R.C.P. 60(b)(2). Furthermore, because Herklotz made no effort to discover the information possessed by von Bernuth, Parkinson, or Plaza, at any time during the 5 ½ years of this litigation, Herklotz did not act with reasonable diligence and was, therefore, not excusably ignorant of the information. Rather, the information was discoverable from von Bernuth, Parkinson and Plaza, but Herklotz's counsel chose not to pursue that discovery. Presumably, Herklotz's counsel decided that such discovery was unnecessary to Herklotz's chosen defensive strategy, which was to argue that WRS could not prove damages because WRS' records would reveal their own inherent unreliability. Therefore,

although Herklotz may not have known about the information possessed by von Bernuth, Parkinson and Plaza, it not newly discovered evidence under F.R.C.P. 60(b)(2).

17. Denied. The averment contained in Paragraph 17 is denied. Based upon the Response to the Parkinson Affidavit at Document No. 139, WRS specifically denies the information raises any genuine issue of material fact with respect to WRS' calculation of Damages. Furthermore, to the extent that Herklotz's Motion relies upon F.R.C.P. 60(b)(2) alleging newly discovered evidence because Herklotz failed to pursue discovery against von Bernuth, Parkinson and Plaza during the 5 ½ years of this proceeding, Herklotz cannot establish that the information he characterizes as "new" would not have been obtained by the exercise reasonable diligence. Furthermore, the time period for moving for such relief has expired.

18. Denied. WRS incorporates by reference thereto the Response to Paragraph 17.

19. Admitted in part. Denied in part. WRS denies that the evidence was not brought to light because of John Gibson's errors. Rather, Herklotz did not know of the evidence because Herklotz never pursued discovery against the parties represented by John Gibson. Accordingly, despite Gibson's admitted misconduct following March 2006, it did not contribute to Herklotz's lack of access to the information. WRS admits the averment contained in Paragraph 19 that the evidence that Parkinson alleges to have was known to him during this action. Furthermore, Herklotz could have discovered this information by pursuing discovery as to Parkinson and Plaza. Therefore, because Herklotz did not exercise reasonable diligence to discover the information, Herklotz was

not excusably ignorant of its existence. Accordingly, it does not qualify as newly discovered evidence under F.R.C.P. 60(b)(2).

20. Denied. Herklotz's current and past counsel did not undertake any discovery from the parties represented by Attorney Gibson. Attorney Gibson had no reason to present any information to Herklotz or his counsel because no such discovery request was made. Therefore, to the extent that Paragraph 20 suggests that Herklotz could undertake additional or further discovery, said averment incorrectly describes Herklotz's actions in this case. Rather, Herklotz did not know of the evidence because Herklotz's never pursued discovery against the parties represented by John Gibson. Accordingly, despite Gibson's admitted misconduct, it did not contribute to Herklotz's lack of access to the information

21. Denied. The averment contained in Paragraph 21 is denied. The information produced by Parkinson, von Bernuth and Plaza, does not contradict the damage calculations of WRS, Inc. The evidence did not establish that payments were received by WRS that were not applied. See Response to Parkinson's Affidavit (Doc 139). The averment is irrelevant since the request based on F.R.C.P. 60(b)(2) alleging newly discovered evidence is untimely. F.R.C.P. 60(c).

22. Denied. To the extent that Paragraph 22 seeks to allege that the basis for opening the Judgment is newly discovered evidence, the Court lacks jurisdiction to entertain that request. F.R.C.P. 60(b)(c).

23. Denied. The averment contained in Paragraph 23 is specifically denied. Rather, while Attorney Gibson after March of 2006 took a less active part in the defense of his particular clients, Defendant Herklotz was represented by counsel from December

8, 2000 by Vicki Hunt Mortimer, Fred Egler, and subsequently Burns, White and Hickton. No effort was made by any counsel representing Herklotz to undertake discovery from von Bernuth, Parkinson, and Plaza, and, accordingly, Attorney Gibson's lack of attention to the case after discovery closed on January 31, 2006 did not play a part in Herklotz's lack of information that was available during the pendency of the case. Furthermore, a Motion asserting that Attorney Gibson's misconduct impaired Herklotz's ability to prosecute his defense is only appropriate under F.R.C.P. 60(b)(3), which permits relief from judgments based upon misconduct of an opposing party. Like F.R.C.P. 60(b)(2), F.R.C.P. 60(c)(1) imposes a time limit of one-year from the Judgment. Herklotz's Motion based on misconduct of an opposing party is therefore untimely. Accordingly, the Court lacks jurisdiction to entertain the Motion premised upon newly discovered evidence pursuant to F.R.C.P. 60(b)(2) or opposing party misconduct under 60(b)(3) because the Judgment was entered more than one-year prior and is prohibited by 60(c)(1).

24. Denied. The averments contained in Paragraph 24 are denied as stated. WRS recognizes that the Judgment entered against Herklotz is in a significant amount. However, the major portion of the credit extended was incurred for Herklotz's benefit to produce copies of his film "Giant of Thunder Mountain." Herklotz's participation in Plaza is described in the Affidavit (Doc 128 and in particular Exhibit 16). The Plaza receivable was the largest debt owed to WRS at the time of its Chapter 11 filing. Had Herklotz honored his Guaranty and paid WRS the amount then owed, WRS might have survived as an ongoing entity rather having had to confirm a liquidating Chapter 11 that resulted in the loss of approximately 350 jobs. WRS has diligently prosecuted the case to

judgment, has not benefitted by the lack of diligence exhibited by John Gibson, and has provided Herklotz every opportunity to obtain the necessary information to prosecute his defense. His counsel made the strategic decisions concerning how to prosecute the case, what evidence should be discovered, what theories should be advanced. Now in hindsight, they see that perhaps information was out there for which they never asked. F.R.C.P. 60(b) is not intended to relieve parties of the consequences of their counsel's choices.

25. Denied. The averment contained in Paragraph 25 is denied. The misconduct of an opposing party that impairs the ability of another party to prosecute their case is not extraordinary cause that would permit relief from the Judgment based on F.R.C.P. 60(b)(6). Rather, to the extent that Attorney John Gibson's lack of diligence had any effect on the defense asserted by Herklotz, relief would only be appropriately based on F.R.C.P. 60(b)(3). However, Herklotz's request for that relief is untimely. Furthermore, Herklotz through original and subsequent counsel made a strategic choices not to pursue any discovery from Parkinson, von Bernuth, or Plaza, notwithstanding the fact that the case was pending for 5 ½ years and that Herklotz's general contention was that the amounts of damages claimed by WRS were inaccurate. Herklotz never asked for the information that Gibson's clients had so Gibson never had the opportunity to engage in any misconduct with respect to that request. Herklotz has not and cannot demonstrate that his Motion qualifies under "newly discovered evidence" or "opposing party misconduct" as would permit the Court to entertain a 60(b)(2) or 60(b)(3) Motion. No extraordinary circumstances (other than those covered by 60(b)(2) and (3)) have been alleged. Finally, Herklotz did not raise when previously appropriate his claim that the

court could not properly adjudicate his liability independent from Plaza. Having failed to raise that issue when he should have, Herklotz cannot assert it as an afterthought and claim it qualifies as an extraordinary circumstance under F.R.C.P. 60(b)(6). Rather, no extraordinary circumstances exist which would permit the Court to open the Judgment pursuant to F.R.C.P. 60(b)(6). 60(b)(6) is not available to relieve a party who has had the opportunity to litigate from the consequences of the conscious choice regarding the conduct of the litigation. Ackermann v. United States, 340 U.S. 193, 202, 71 S. Ct. 209, 95 L. Ed. 207 (1950).

WHEREFORE, because the Court lacks jurisdiction to entertain this Motion under F.R.C.P. 60(b)(2) and (3) because it is not filed within the time required by F.R.C.P. 60(c)(1), because F.R.C.P. 60(b)(6) cannot be used to circumvent the timing requirement imposed by F.R.C.P. 60(c)(1), because one year is the reasonable time within the Motion based only on 60(b)(6) should have been filed and because Herklotz cannot demonstrate any extraordinary circumstances involving the entry of Summary Judgment, WRS, Inc., respectfully requests that the Court deny the requested relief.

Respectfully submitted,

THOMAS E. REILLY, P.C.

BY: /s/ Thomas E. Reilly
____

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CERTIFICATE OF SERVICE

I, Thomas E. Reilly, Esquire, hereby certify that a true and correct copy of WRS, Inc.'s Response to Defendant Herklotz's Motion to Open Judgment was delivered via first-class mail, postage pre-paid on the 21st day of May, 2008, to the following:

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Respectfully submitted,

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